

**PD-1229-16**

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IN THE COURT OF CRIMINAL APPEALS

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FILED  
COURT OF CRIMINAL APPEALS  
3/13/2017  
ABEL ACOSTA, CLERK

**THE STATE OF TEXAS,  
APPELLEE**

**vs.**

**ERNESTO LERMA,  
APPELLANT**

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PETITION FROM CAUSE NO. 14-CR-3970-H  
IN 347<sup>TH</sup> JUDICIAL DISTRICT  
OF NUECES COUNTY, TEXAS, AND  
CAUSE NO. 13-15-00417-CR  
IN THE COURT OF APPEALS FOR THE  
THIRTEENTH DISTRICT OF TEXAS

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**RESPONSE TO STATE'S MERITS BRIEF**

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**ATTORNEY FOR APPELLANT**

Oral Argument is Requested.

## **STATEMENT REGARDING ORAL ARGUMENT**

Oral Argument is requested on Appellant's behalf to facilitate and elucidate the manner in which the facts relate to the legal arguments.

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**RESPONSE TO STATE’S MERITS BRIEF**

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Appellant, ERNESTO LERMA, submits this Response to the State’s Brief on the Merits.

**RESPONSE TO STATE’S ISSUE PRESENTED**

- I. The cocaine is inadmissible as fruit of the poisonous tree after it was unlawfully seized pursuant to a flight from an unlawful pre-arrest frisk and prolonged detention.**

## **STATEMENT OF FACTS**

On November 2, 2014, Officer Salinas pulled over a vehicle for failure to stop behind the stop lines and failing to signal before one hundred feet. R.R.p. 37, Ln. 1-3; 6-8.<sup>1</sup> Appellant was the front seat passenger in the vehicle (R.R. p. 22, Ln. 16-25), and there was a woman and child in the backseat. Officer Salinas informed the driver of why he was stopped and asked for his information and if he had any weapons in the vehicle. *See* State's Ex. A. Because Officer Salinas noticed Appellant was nervous and fidgety, he went over to the passenger side of the vehicle to question him and make sure Appellant "did not have a weapon." R.R. p. 25, Ln. 7-8, 13-19. The driver handed Officer Salinas his license and insurance information, across Appellant to Officer Salinas on the opposite side. Officer Salinas told the driver, "you can hold on to this" and immediately returned it. R.R. p. 21, Ln. 1-3; p. 23, Ln. 9-13; p. 38, Ln. 12-19. No citation or warning was issued, and Officer Salinas testified that he had already made an enforcement action determination at that point. R.R. p. 23, Ln. 9-13, p. 24, Ln. 4-7. Officer Salinas further admitted on the record that he was done with the investigation of the traffic stop for the reason why the driver was pulled over. R.R. p. 24, Ln. 12-20.

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<sup>1</sup> Citations to the Reporter's Record will be as follows: "R.R. Vol. \_\_, p. \_\_, Ln. \_\_."

Despite conceding that the traffic stop was completed, Officer Salinas continued his investigation and asked Appellant for his identification card, which Appellant did not have. R.R. p. 26, Ln. 14-16. According to Officer Salinas, Appellant seemed “unsure of himself,” so Salinas asked Appellant to step out of the vehicle to pat him down and “make sure” Appellant did not have any weapons. R.R. p. 26, Ln. 11-12; p. 27, Ln. 4-6, Ln. 9-11. In his testimony, Officer Salinas conceded that there was no indication of any crime being committed by Appellant. R.R. p. 41, Ln. 12-15. Officer Salinas admitted that he did not have any evidence that Appellant was armed and dangerous; Salinas just had a “hunch” and was “suspicious” of why Appellant was nervous. R.R. p. 43, Ln. 13-21. According to his testimony, Officer Salinas he needed to make sure there were neither weapons nor narcotics in the car because of Appellant’s furtive movements. R.R. p. 41, Ln. 7-11. Officer Salinas further testified that it was “normal protocol” to pat down anyone taken out of a vehicle, and Appellant was not free to leave. R.R. Vol. 43, p. 9-12, 22-24. When asked about his specific reason for the pat down, Officer Salinas stated that he was patting Appellant down for “anything that may have been illegal.” R.R. p. 47, Ln. 10. Officer Salinas admitted that when doing the pat down, he was “not specifically” looking for weapons; his only safety concern was that Appellant appeared nervous. R.R. p. 28, Ln. 2-5; p. 48, Ln. 3-7.

When Officer Salinas told Appellant that he was going to pat him down, he asked Appellant if he had any weapons on him and Appellant admitted that he had a pocket knife. R.R. p. 43, Ln. 13-18. Once Appellant handed over the pocket knife, Officer Salinas began to pat down his pockets for “anything illegal that we commonly come across.” R.R. p. 28, Ln. 12-16. Officer Salinas stated that he felt a hard baggy and cigars, but was not able to tell if the cigars had an illegal substance in them from the pat-down. R.R. p. 30, Ln. 1-4; p. 45, Ln. 1-3. He also stated that he was unable to tell what the baggie was, but it raised his suspicion. R.R. p. 46, Ln. 13-16. Additionally, Officer Salinas testified that he felt a small Tupperware container in Appellant’s cargo pocket. R.R. p. 31, Ln. 20-21. However, Officer Salinas made no mention of these findings on the video, nor did he have any reaction to “feeling” them. *See* State’s Ex. A; R.R. p. 30, Ln. 5-7.

After the pat-down, Officer Salinas asks Appellant for his name, to which Appellant responded, “Bobby Diaz.” R.R. p. 32, Ln. 1-5. Officer Salinas admittedly had no reason to believe that Appellant was not in fact Bobby Diaz. R.R. p. 50, Ln. 7-9. Officer Salinas then continued questioning Appellant for approximately two minutes, asking him why he is nervous, when was the last time Appellant was arrested, and if he was “on paper.” *See* State’s Ex. A, at 4:30 into the video; R.R. p. 51, Ln. 5-10. Officer Salinas then asked Appellant again if he had anything on him that he needs to know about, and asks Appellant if it is “okay

if I check;” Appellant replies “no.” *See* State’s Ex. A, at 5:50 into the video. Officer Salinas then asked Appellant again for his name and date of birth before telling Appellant to sit on the curb with Salinas’ partner who just arrived, so that Officer Salinas could run Appellant’s information. *See* State’s Ex. A, at 6:18 into the video. After sitting in his car and running the information Appellant gave him, Officer Salinas approached Appellant again and asked Appellant where he was from. *See* State’s Ex. A, at 8:30 into the video. After Appellant answered the question, Officer Salinas then asked him about when was the last time he smoke weed. *See* State’s Ex. A, at 8:30 into the video. In the video recording, Officer Salinas then told Appellant that he did not know if Appellant had anything on him, so he was going to check again, telling Appellant to “just be cool,” and patted him down for a third time that evening. *See* State’s Ex. A, at 9:15 into the video. Appellant admitted before this third pat-down that he had some “synthetic” on him. R.R. p. 33, Ln. 12-14; *See* State’s Ex. A, at 8:30 into the video. Officer Salinas then pulled the substance out of Appellant’s pocket and Appellant fled on foot. R.R. p. 33, Ln. 20-22; *See* State’s Ex. A, at 9:55 into the video. Appellant was subsequently tackled to the ground and made incriminating statements about the narcotics on his person and about his outstanding parole violation. R.R. p. 35, Ln. 3-6. Officers confiscated a baggie of synthetic marijuana, cigars, and crack rocks. R.R. p. 30, Ln. 14-19.

## **SUMMARY OF THE ARGUMENT**

Appellant submits in this response that the Thirteenth Court of Appeals did not err in reversing the trial court because the evidence must be suppressed as fruit of the poisonous tree. The search and seizure of contraband from Lerma's person was unlawful based on the prolonged detention and illegal pat-down, which led to Appellant's flight from officers and the subsequent finding of contraband.

## **ARGUMENT AND AUTHORITIES**

### **A. THE UNLAWFUL DETENTION**

The Thirteenth Court of Appeals did not err in holding that the detention of Lerma's person was illegally prolonged, and the frisk of his person was unlawful, thus tainting any later acquired evidence. Officer Salinas lacked reasonable suspicion necessary to believe that Appellant had committed or was about to commit a crime, and there was no crime committed at all other than the alleged traffic violation. *See Terry v. Ohio*, 392 U.S. 1(1968).

Appellant should have been given a traffic citation or warning and the investigation should have been terminated after the original purpose of the stop was concluded. *See St. George v. State*, 197 S.W.3d 806, 817 (Tex.App.—Fort Worth 2006). In the instant case, the purpose of the stop was completed after Officer Salinas decided that he was not going to give the driver a citation. At the motion to suppress hearing, Officer Salinas testified that he had already made an

enforcement action when he handed the driver back his information long before telling Appellant to step out of the car. *See* R.R. p. 21, Ln. 1-3; p. 23, Ln. 9-13; p. 24, Ln. 4-7; p. 38, Ln. 12-19; *see also* State's Ex. A. By his own admittance, Officer Salinas simply had "suspicions," and acted on that hunch. In his testimony, Officer Salinas admitted to detaining Appellant and pulling him out of the car to make sure there were no weapons or narcotics in the vehicle because Appellant looked nervous. Without separate reasonable suspicion, having Appellant exit the vehicle and detaining him was beyond the scope of the stop, and unnecessarily prolonged its duration. *See Sieffert v. State*, 290 S.W.3d 478 (Tex.App.-Amarillo 2009). Officer Salinas is prohibited from using the stop as a fishing expedition for unrelated criminal activity, such as possession of a controlled substance, which is exactly what he did here.

This case is analogous to *St. George*, and the Thirteenth Court of Appeals was justified in relying on it. *See St. George v. State*, 237 S..3d 720, 722 (Tex.Crim.App. 2007). Although the State argues that the facts are distinguishable, the behavior and actions of the officers in both cases are one in the same. The only specific fact alleged by Officer Salinas for a continued detention was that Appellant appeared nervous. However, it is well established that nervousness is insufficient to justify a continued detention. *See United States v. Jenson*, 462 F.3d. 399 (5<sup>th</sup> Cir. 2006); *United States v. Santiago*, 310 F.3d 336,

338, *reh'g en banc denied*, (5<sup>th</sup> Cir. 2003). The record is clear that Officer Salinas had already decided not to give a citation, and his purpose of the stop was over. Even if, as the State contends, Officer Salinas' "concerns" with the lady in the backseat with the improperly restrained child could justify the detention, Officer Salinas did nothing but focus on Lerma instead of dispelling his apprehensions of the child's safety and the woman's potentially criminal activity. *See Florida v. Royer*, 460 U.S. 491, 500 (1983)(holding that the investigative methods employed during an investigative detention should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time). The officer is not justified in unlawfully prolonging the detention of other passengers before fulfilling his ultimate purpose. Officer Salinas' actions clearly indicate a desire to find Appellant committing an unrelated offense.

Furthermore, although the State contends that the detention was justified because Lerma smelled like marijuana, this allegation is not supported by Officer Salinas' testimony. Salinas testified that the only reason he decided to pat Lerma down was to look for anything illegal on his person, not because he smelled like marijuana. The alleged smell of marijuana mentioned in the video only comes after Lerma was already patted down and Salinas felt a baggie and cigars in his pocket. Salinas testified that the pat down turned his investigation into a search for narcotics. The State further argues that the detention was justified because Lerma

gave a false name. However, Officer Salinas admitted that he had no reason to believe that Lerma was not “Bobby Diaz,” and could not use that to justify the detention. Just as in *St. George*, the fact that the passenger provided wrong information and appeared nervous was not enough to provide the officer with reasonable suspicion to prolong the detention.

Thus, evidence seized during an unlawful detention is inadmissible under the exclusionary rule.

#### **B. FRUIT OF THE POISONOUS TREE**

The fruit of the poisonous tree doctrine prohibits the use of evidence that was obtained as a result of an illegal arrest, search, or seizure, and applies to both direct and indirect products of Fourth Amendment Violations. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The question must then be presented whether the evidence has come to light by exploitation of the primary illegality or instead by means sufficiently distinguishable to be cleansed of the primary taint. *Wong Sun*, 371 U.S. at 488.

Even if the detention was lawful, the multiple patdowns of Lerma’s person were illegal and Lerma’s subsequent flight was a direct result and evidence found should be suppressed as fruit of the poisonous tree. Officer Salinas conducted the unlawful search of Appellant’s person in order to find narcotics and was determined to find “anything that may have been illegal,” or “anything illegal we

commonly come across.” Officer Salinas unlawfully patted Appellant down two times before running his information. Then Officer Salinas told Appellant he was going to pat him down *again* just to be sure Appellant did not have anything on him, which resulted in Lerma admitting he had synthetic marijuana, fleeing from the officers, and discovery of the contraband in question.

The State’s contention that the post-frisk arrest was lawful is a misplaced attempt to use the ends to justify the means. The prolonged detention, multiple unlawful frisks, and Appellant’s flight were all part of the same chain of events. Appellant would not have fled if he had not been unlawfully detained and unlawfully patted down multiple times. Officer Salinas conceded that Lerma was doing nothing wrong and he had no reason to suspect that he was committing a crime. The State does not contest that the patdowns pre-flight were unlawful, and only attempts to justify the search incident to arrest post-flight. However, the record and video of the stop show that Appellant fled immediately after he was told that he was going to be patted down again, just to be “sure” he had nothing on him. The State fails to show an attenuation of the search incident to arrest and the prolonged detention and illegal patdowns. Because the narcotics would not have been found had Officer Salinas not prolonged the detention and unlawfully frisked Lerma multiple times, the fruits of the poisonous tree doctrine applies and the evidence is inadmissible.

**CONCLUSION AND PRAYER FOR RELIEF**

For the abovementioned reasons, Appellants respectfully requests that this Court affirm the judgment of the Thirteenth Court of Appeals.

Respectfully submitted,

/s/Celina Lopez Leon

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**RULE 9.4(i) CERTIFICATION**

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 2,427.

/s/Celina Lopez Leon

**CELINA LOPEZ LEON**

### **CERTIFICATE OF SERVICE**

As Attorney of Record for Appellant, I do hereby certify that a copy of the foregoing Response has been E-Served to Stacey M. Soule, Esq., State Prosecuting Attorney, Austin, TX, at [information@spa.texas.gov](mailto:information@spa.texas.gov) on this 12<sup>TH</sup> day of March, 2017.

/s/Celina Lopez Leon

**CELINA LOPEZ LEON**